86-619



No.

IN THE

# SUPREME COURT OF THE UNITED STATES

OF AMERICA

MARIE A. ALLEN

*Petitioner*

*v.*

CHILTON CO., DIVISION OF A.B.C., INC.

*Respondent*

Civil Action Number 85-1530

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

WHETHER AN UNREASONABLE AND INFLEXIBLE INSISTANCE UPON EXPEDITIOUSNESS IN THE FACE OF A JUSTIFIED AND DOCUMENTED REQUEST FOR DELAY DEPRIVES THE PARTY OF THE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

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1. Review is sought of the judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit entered on June 11, 1986, affirming the judgment of dismissal of the United States District Court for the Eastern District of Pennsylvania.

2. A timely Petition for Rehearing en banc was denied on July 14, 1986.

3. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Third Circuit is conferred by 28 U.S.C. 1254(1).

## STATEMENT OF STATUTES INVOLVED

A. Civil Rights Act, 42 U.S.C. 1981

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I. United States Constitution — Fifth Amendment

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## A. CIVIL RIGHTS ACT

### 42 U.S.C. 1981 Equal rights under the law

All persons within the jurisdiction of the United States shall have the some right in every State and Territory to make and enforce contracts, to sue, to be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

## B. TITLE VII

### 42 U.S.C. 2000e-2 Discrimination because for race, color, religion, sex or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color, religion, sex or national origin.

### 42 U.S.C. 2000e-5

(f) Civil action by Commission, Attorney General or person aggrieved.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the

Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the compliantant and in such circumstances as the court may deem just, the court may appoint an attorney for such complaintant and in such circumstances as the complaintant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or

the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, many bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of actions brought under this title [42 U.S.C. sec. 20003 et seq.]. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principle

office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28 U.S.C. sec. 1404, 1406], the judicial district in which the respondent has his principle office shall in all cases be considered a district in which the action might have been brought.

## C. EQUAL PAY ACT OF 1963

**29 U.S.C. 206**

(d)(1) No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

## D. FEDERAL RULE OF CIVIL PROCEDURE 37

Failure to Make or Cooperate in Discovery: Sanctions

(b) Failure to Comply with Order (1) Sanctions by court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court. (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a

person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule of Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following;

(c) An order striking out pleadings or parts thereof, of staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party.

## E. FEDERAL RULE OF CIVIL PROCEDURE 26(C)

Failure to Make or Cooperate in Discovery: Sanctions

(c) Protective Orders: Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery that other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed in a designated way; (8) that the parties simultaneously file specified documents or

information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

## F. PENNSYLVANIA CODE OF PROFESSIONAL RESPONSIBILITY

**DR 7-101 Representing a Client Zealously.**

(A) A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105. (3) Prejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B).

## G. 28 U.S.C. 1343(4)

**Federal question: amount in controversy; costs**

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States and agency thereof, or any officer or employee thereof in his official capacity.

**Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

**H. 28 U.S.C. 1254(1)**

**Court of appeals; certiorari; appeal; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

## I. UNITED STATES CONSTITUTION — FIFTH AMENDMENT

Criminal actions Provisions concerning Due process of law and jut compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in the cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life, liberty, or property, without due process of law; nor shall private property, without due process of law, nor shall private property be taken for public use, without just compensation.

## J. UNITED STATES CONSTITUTION — SIXTH AMENDMENT

Rights of the accused.

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## K. UNITED STATES CONSTITUTION — FOURTEENTH AMENDMENT

### Section 1 Citizens of the United States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MARIE A. ALLEN, | : | CIVIL ACTION |
| *Plaintiff* | : | |
| *v.* | : | |
| CHILTON CO. | : | No. 84-4852 |
| Division of A.B.C. Inc. | : | |
| *Defendant* | : | |

## STATEMENT OF FACTS

On October 9, 1984, Beverly K. Thompson, Esquire, filed a Complaint on Petitioner's behalf in the United States District Court for the Eastern District of Pennsylvania, seeking monetary damages and punitive relief for the Petitioner/Plaintiff and the class of individuals employed by the defendant, Chilton Company, for violations of the Equal Pay Act, 29 U.S.C. 206(d); Title VII of the Civil Rights Act of 1986, 42 U.S.C. 2000e to 2000e-17, and the Pennsylvania Human Relations Act (PHRA), Pa. Stat. Ann. tit. 43 951-963 (Purdon 1964 & supp. 1984).

Shortly thereafter, on October 19, 1984, Petitioner's counsel underwent non-elective surgery, anticipating that her recovery period would last roughly six weeks. Due to unforeseen complications, the period of recovery took considerably longer, thereby necessitating the scheduling and re-scheduling of depositions by both sides.

Petitioner's counsel's health steadily continued to worsen after the October surgery and on March 14, 1985, she informed the trial judge and opposing counsel by letter that due to post-operative complications she was requesting that the case be placed on inactive status until she could find replacement counsel with the requisite skill necessary to handle employment discrimination litigation with class-wide exposure. Petitioner's counsel believed she was professionally and ethically bound to seek replacement counsel since

her health problems prevented her from zealously pursuing her client's interests and candidly revealed this to the Court and opposing counsel.

On March 15, 1985, in response to Petitioner counsel's March 14, 1985 letter, Respondent's counsel filed a belated Motion for Sanctions for failure of Petitioner to appear at the February 6th deposition. The district court judge entered an Order, on March 27, 1985, requiring petitioner to appear at a deposition within five (5) days written notice as well as imposing a Three Hundred Dollar ($300.00) fine on Petitioner's counsel. As of the date of the Order, the case was merely five months old and there had been no prior Motions to Compel or sanctions for non-compliance with discovery Orders. This Order and fine was also imposed absent the requisite articulation of evidence of "bad faith" or "callous disregard" of court orders or proceedings on the part of Petitioner's counsel, as required by the Supreme Court in *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980)

Respondent immediately seized upon the opportunity and unilaterally scheduled depositions for April 8, 1985. Petitioner's counsel was able to obtain attorneys, Gary Green, Esquire and Robert Davitch, Esquire of Sidkoff, Pincus and Green, as replacement counsel. Both attorneys were in the midst of three (3) complex cases which were to be tried between May 13, 1985 and July 1985. By Affidavit placed in the record below, they made what could fairly be considered as a reasonable request to the court and Respondent's counsel that petitioner's case be placed in the suspense docket for sixty (60) days to give them a chance to review the file and enter their appearance and that the April 8 depositions be rescheduled. The court refused to place the matter on inactive status and the respondent, refused to rescheduled petitioner's deposition. Replacement counsel therefore necessarily declined representation, thus leaving Petitioner's counsel with a case she was too ill to handle and a client she could not abandon. Nevertheless,

counsel persisted in her efforts to find a replacement. The affidavit of counsel's secretary, Barbara Cummings, included in the record below, clearly indicates that numerous contacts were made in this regard.

Due to a relapse, Petitioner's counsel was admitted, on April 25, 1985, to Kennedy Hospital, where she remained for one month until she was transferred to Germantown Hospital where she underwent two (2) major surgeries and remained until June 6, 1985.

Knowing the circumstances, the Respondent filed another Motion to Dismiss. In response, Petitioner's counsel dictated, from her hospital bed, a Formal Motion for Leave to Place the Matter on Inactive Status Pending Referral, therein requesting that the court stay all proceedings in this matter for sixty days in order to obtain new replacement counsel.

Petitioner's request remained disregarded, and on May 13, 1985, the district court entered an Order directing the Petitioner to find new counsel by May 31, 1985, and to appear at any deposition scheduled on or after June 10, 1985, regardless of whether such counsel was retained. Counsel responded to this Order, while at Germantown Hospital, by filing a Motion for Reconsideration, arguing that the court's May 13, 1985 Order was unreasonable and tantamount to dismissal since it did not afford Plaintiff adequate time in which to find new counsel experienced in Title VII and class action suits, and more importantly one who would be available immediately.

While Petitioner's counsel was awaiting the court's consideration of her Motion for Reconsideration, (the response to which never materialized), the Respondent on June 3, scheduled yet another deposition, this time for June 6, 1985. The Respondent again disregarded Petitioner counsel's reasonable request for postponement. After being duly notified by Petitioner's counsel that neither the Petitioner nor her counsel would attend the scheduled June 10, 1985 deposi-

tions, the Respondent filed another Motion for Sanctions seeking dismissal of Petitioner's Complaint. Judge Van Artsdalen granted Respondent s Motion and entered an Order dismissing the Complaint on August 1, 1985.

## ARGUMENT

### I. THE RIGHT TO RETAIN COUNSEL IN A CIVIL MATTER IS A PROPERTY RIGHT PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Protection from the deprivation of property and/or liberty without due process of law is guaranteed through the Fifth and Fourteenth Amendments of the United States Constitution. This right is violated if there is a governmental deprivation of life, liberty or property without notice and fair hearing, which are essential preliminary steps to the passing of an enforceable judgment in a civil proceeding. *Malone v. Central Hanover Bank and Trust Company,* 334 U.S. 306, 313 (1950); *Powell v. Alabama,* 287 U.S. 45, 68 (1932); *Hovey v. Elliot,* 167 U.S. 409, 419 (1897). Historically, the right to a hearing has always been integerally related to the right to the aid of counsel when desired and provided by the party asserting the right. *Powell,* 287 U.S. at 69.

If due process entitles one to a fair hearing in a civil matter, the foundations exist for deeming the denial of counsel in a civil proceeding a deprivation of a property right without due process of law. "If in any case, civil or criminal, a state or federal court were to arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and therefore, of due process in the constitutional sense." *Powell v. Alabama,* 287 U.S. 45, 69; *accord. Roberts v. Anderson,* 66 F.2d 874 (10th Cir. 1973); *Rex Investigative and Patrol Agency, Inc. v. Collure,* 329 F.Supp. 696, 697 (E.D. N.Y. 1971).

Unlike the criminal defendant's right to counsel, which arises directly from the Sixth Amendment, the civil litigant's right to retain counsel is rooted in the Fifth Amendment's notions of due process. This right however, does not require the government to provide lawyers for litigants in civil matters. *Hallom v. Burrows,* 266 F.2d 547 (6th Cir.), *cert. denied.,* 361 U.S. 914 (1954). The law affords greater protection to the criminal defendant and their right to counsel since they are faced with a potential loss of personal liberty and are therefore deemed to have more at stake than the civil litigant asserting or contesting a claim for damage.

Nevertheless, the civil litigant still has due process interests at stake and must rely on counsel to protect those interests. The civil litigant is similarly situated to the criminal defendant in that the party usually lacks the requisite skill and/or knowledge to adequately prosecute a case. This lack of expertise thereby necessitates the presence of counsel as guidance throughout the proceedings. *Powell* 287 U.S. at 69; *Potasknick v. Port City Construction Company,* 609, F.2d 1101, 1117 (1980). As in a criminal trial, the right to counsel in a civil proceeding has been deemed one of constitutional dimensions which should be freely exercised without arbitrary infringement. *Potasknick,* 609 F.2d at 1118; *Swope v. Bratton,* 541 F. Supp. 99 (1982). Nevertheless, the right to counsel in civil and criminal matters is not absolute. *Urquhart v. Lockhart,* 726 F.2d 1316, 1319 (8th Cir. 1984). This right "must be balanced against the public's interest in the orderly administration of justice". *Linton v. Pernini,* F.2d 207, 209 (6th Cir. 1981), *cert. denied* 454 U.S. 1162 (1982).

In order to promote the orderly administration of justice, trial courts have been granted broad discretion when ruling on a variety of motions. For example, in *Urquhart v. Lockhart,* 726 F.2d 1316 (8th Cir. 1984), which dealt with the denial of a motion to continue, the Eighth Circuit stated

that "trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers and jurors at the same place at the same time, which burdens counsel against continuances except for compelling reasons, consequently broad discretion must be granted trial courts on matters of continuances". *Urquhart,* 726 F.2d at 1319. Nevertheless, the court of appeals therein qualified this "broad discretion" by pointing out that the orderly administration of a civil matter may not be used to sacrifice the due process rights of litigants. "An unreasonable and arbitrary insistance upon expeditiousness in the face of a justified request for delay violates the right to the assistance of counsel". *Id.* at 1314 [citing *Ungar v. Sarafite,* 376 U.S. 575, 589 (1964); *Morris v. Slappy,* 461 U.S. 1 (1983)].

The Petitioner maintains that the principle espoused by this court in *Ungar v. Sarafite,* as well as in *Urquhart v. Lockhurst* is applicable to the facts herein. The record clearly demonstrates that the trial court repeatedly, as well as unreasonably and arbitrarily, denied Petitioner counsel's justifiable requests (by letter and Motion) to place the matter on an inactive status for reasons of seriously ill health and in order to find suitable replacement counsel. At the time counsel first filed her request with the trial court, the case was barely five (5) months old. The court's denial of this first request in its Order, dated March 27, 1985, which directed Petitioner to appear at a scheduled deposition within five (5) days written notice regardless of whether or not Petitioner secured replacement counsel, should be considered, according to *Ungar,* an unreasonable and arbitrary insistance upon expeditiousness in the face of a justified request for delay which would result and did result in a violation of Petitioner's right to the assistance of counsel. The trial court's March 27, 1985 Order was especially harsh in light of the fact that there was a total absence of any wilfulness or bad faith conduct on the part of Petitioner or her counsel as well as an absence of any prior court order.

The trial court's total indifference to counsel's circumstances was further evident in its May 13, 1985, Order which directed Petitioner to find suitable replacement counsel by May 31, 1985, as well as to appear at depositions scheduled by Respondent, regardless of whether Petitioner retained new counsel. Petitioner asserts that the total lack of contumacious conduct on the part of Petitioner and her counsel should demonstrate to this Honorable Court that the trial court herein abused its discretion when imposing these court Orders upon Petitioner, which unreasonably and arbitrarily precluded Petitioner's due process right to the assistance of counsel.

## II. THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CAUSE OF ACTION HEREIN DENIED PETITIONER HER DUE PROCESS RIGHT TO COUNSEL AND HER RIGHT TO A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE MERITS OF HER ACTION.

The Federal Rules of Civil Procedure 37(b)(2) allows a trial court broad discretion when imposing sanctions on parties who fail to make discovery. *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643 (1976); *Digregorio v. First Re-Discount Corporation,* 506 F.2d 781 (3d Cir. 1974). This broad discretion, however, is limited by the due process clause of the Fifth Amendment to the Constitution which recognized that a party should be allowed the opportunity for a hearing on the merits of his/her action. *Societe International v. Rogers,* 357 U.S. 197, 209 (1958). Because of these due process considerations, the sanction of dismissal, widely regarded as extreme, is normally imposed sparingly and even then only when less drastic alternatives have been explored and exhausted. *Ramsey v. Bailey,* 531 F.2d 706, 708 (5th Cir. 1976), *cert. denied,* 429 U.S. 407 (1977); *Poulis v. State Farm Fire and Casualty Company,* 747 F.2d 863, 867 (3rd Cir. 1984).

The sanction of dismissal is an appropriate sanction only where a party has acted in "flagrant bad faith" and when counsel's conduct demonstrated "a callous disregard of responsibilities". *National Hockey League,* 427 U.S. at 643. Furthermore, the sanction of dismissal is appropriate only where there is a clear record of delay or contumacious conduct by the petitioner. *Id.* at 643. Otherwise, dismissal is an abuse of discretion and should not be upheld. *Denton v. Mr. Swiss of Missouri, Inc.* 564 F.2d 234, 236 (8th Cir. 1977).

This Honorable Court in *Societe International v. Rogers,* 357 U.S. 197 (1958), stated that an "abuse of discretion" will arise if the dismissal was the result of a party's inability to comply rather than through "willfulness, bad faith or fault". *Id.* at 212; *Donnelly v. John-Manville Sales Corporation,* 671 F.2d 337 (3d Cir. 1982). The reasoning of this Court in *Societe* coupled with the reasoning in *Unger v. Sarafite,* 376 U.S. 575, 589 (1964), that such sanctions may violate a party's right to assistance of counsel, demonstrates that the district court's imposition of the sanction of dismissal herein amounts to an abuse of discretion and a denial of fundamental fairness by rejecting counsel's justifiable requests for delay to find suitable replacement counsel. In *Unger,* this Honorable Court reasoned that a party's due process right cannot be abridged simply in order to promote the orderly administration of justice *Id.* 376 U.S. at 589. This court has appreciated that the orderly administration of a civil matter may not be used to sacrifice the due process right of litigants. "An unreasonable and arbitrary insistence upon expeditiousness in the face of a justified request for delay violates the right to the assistance of counsel." *Unger,* 376 U.S. at 589.

The district court herein unreasonably and arbitrarily threatened the extreme sanction of dismissal, in the interest of expediency, when faced, after three different occasions, with Petitioner's counsel's justifiable request for delay stemming from ill health and the need to secure suitable replacement counsel. Imposing such a sanction herein, while

alleging that counsel's failure to engage in court ordered discovery was due to "willfulness" and/or "bad faith", totally precludes petitioner's due process right to a fair hearing as well as to the assistance of counsel.

Throughout the short term of these proceedings, and particularly throughout the three month period between March and June, 1985, when opposing counsel repeatedly filed motions to dismiss, the district court continuously rebuffed Petitioner counsel's reasonable requests for delays to secure replacement counsel due to ill health. The district court was in receipt of counsel's March 14, 1985 request to place the matter on inactive status when, on March 27, 1985, it entered an Order directing Petitioner to appear at an oral deposition within five (5) days written notice with or without counsel, as well as directing Petitioner's counsel to remit the sum of Three Hundred Dollars ($300.00) in costs to Respondent. By ordering the petitioner to appear at deposition within five days notice, regardless of counsel's medical problems, the district court denied the petitioner her due process right to the assistance of counsel. The district court's order further imposed costs on Petitioner's counsel, despite an absence of "bad faith" conduct. As previously stated, the Supreme Court in *Roadway Express, Inc. v. Piper,* 447 U.S. 752 (1980), held that the imposition of counsel fees absent a specific finding that counsel's conduct constituted "bad faith", is an abuse of discretion. *Id.* 447 U.S. at 766.

Under the Pennsylvania Code of Professional Responsibility, an attorney must endeavor to represent a client zealously and should withdraw from proceedings if the attorney's continious representation would prejudice his/her client during the course of the professional relationship. *See,* Pennsylvania Code of Professional Responsibility, DR7-101(A)(1)-(3). In the case herein, the Petitioner's counsel was ethically obligated to withdraw from these proceedings since her ill health and disability prevented her from duly carrying out her client's interests. Therefore, counsel was

clearly acting reasonably and in good faith when, on March 14, 1985, and prior to Respondent's first Motion for Sanctions, she requested that the district court place the matter on inactive status pending the retention of a new counsel. Also, at this point in the proceedings, the only evidence of delay occurred when the Petitioner failed to attend the February 6, 1985 depositions, despite the fact that Respondent was clearly notified in advance that she would not be able to appear on that date. Despite Petitioner's absence on February 6, 1985, the Respondent curiously chose not to file a Motion for Sanctions until after having received notice of Petitioner's counsel inability to proceed with the action. The district court's order of March 27, 1985, was therefore, extreme in that the circumstances did not demonstrate "flagrant bad faith" nor a "clear record of delay, and or contumacious conduct" by the Petitioner. *National Hockey League*, 427 U.S. at 643. Nevertheless, the district court was indifferent to any and all of counsel's requests, be they by correspondence and/or formal motions.

It is totally incomprehensible why the district court considered Petitioner counsel's conduct "dilatory" and/or "contumacious". The record clearly demonstrates that as soon as counsel became aware of the extent of her disability, she immediately attempted to refer the case at bar, as well as other cases. Counsel became hampered in her efforts by opposing counsel's total lack of cooperation as well as the district court's failure to comprehend counsel's dilemma. Instead of allowing counsel to concentrate her efforts on obtaining a replacement counsel, counsel was forced to expend time and energy answering Respondent's tactical motions. Furthermore, the district court's refusal to place the matter on inactive status resulted in replacement counsels', attorneys Green and Davitch of Sidoff, Pincus and Green, declining representation due to a conflict in their schedules.

Petitioner's counsel continued her efforts to find a replacement, until April 25, 1985, when she physically collapsed and was taken, by ambulance, to Kennedy Hospital. One week later her condition stabilized and she was then transferred to Germantown Hospital where she underwent two (2) surgeries. She was not released until June 6, 1985. Throughout these months of hospitalization, Petitioner's counsel was under the influence of narcotic pain killers, which prevented her from attending to professional matters.

Nevertheless, it was throughout this period that counsel was required to a) answer Respondent's Motion for Sanctions filed on April 17, 1985, and b) comply with the district court's May 13, 1985, order requiring Petitioner to obtain new counsel by May 31, 1985.

The Petitioner's counsel responded to Respondent's Motion by filing, on May 1, 1985, a Motion for Leave to Place the Matter on an Inactive Status Pending Referral, which formally cited counsel's continuously worsening health as the reason which necessitated her withdrawal. As evidenced by the court's May 13, 1985, order, counsel's motion was effectively denied, requiring counsel to file, on May 29, 1985, a Motion for Reconsideration in response to the May 13th Order.

It's been correctly pointed out by the Respondent and the Court of Appeals that the proper course of conduct by counsel was to have filed a Motion for Protective Order instead of a Motion for Reconsideration. Regardless of this technicality, counsel's failure to properly title the motion at this point in the proceedings is not evidence of "bad faith" and "wilfullness", particularly in light of the circumstances.

Federal Rule of Civil Procedure 26(c), provides, in pertinent part, that:

> ". . . . for good cause shown, the court in which the action is pending or alternatively on matter relating to a

deposition, the court in the district where the deposition is to be taken may make any Order which justice requires to protect the party or the person from an annoyance, embarrassment, oppression or undue burden or expense . . ."

If Petitioner's counsel had filed a Motion for Protective Order in the case at bar, as set forth under Federal Rules of Civil Procedure 26(c), her arguments, namely that Petitioner should not be Ordered to attend the June 10, 1985, deposition without the assistance of counsel, would have been identical to the argument put forth in her Motion for Reconsideration. Furthermore, the relief sought in both motions were identical, as were the supporting facts. Any additional motions on counsel's part merely would have been duplicative.

It is quite unreasonable for the district court to dismiss Petitioner's cause of action solely on the unsupported inference propounded by Respondent's counsel that Petitioner counsel's alleged dilatory conduct was "contumacious", i.e. "wilful" and in "bad faith". It is well settled that a legitimate excuse or reason for failing to comply with court ordered discovery "would belie classification of [counsel's] conduct as contumacious". See *Green v. Forney Engineering Company,* 589 F.2d 243 (5th Cir. 1979); *Silus v. Sears Roebuck and Company, Inc.* 585 F.2d 382 (5th Cir. 1978). In *Green,* the court dealt with a counsel's failure to attend a pre-trial conference and comply with the Court's request for reply memorandum, due to counsel's gall bladder operation and related medical complications. The majority in *Green* declined to make a determination on the issue of whether counsel's health problems presented a justifiable excuse for failure to prosecute. *Id.* 589 F.2d 247-8. Nevertheless, the concurring opinion believed that such conduct presented the court with a "legitimate excuse". Since counsel's explanation of his absence was not disputed therein and since the non-appearance of counsel was not a deliberate disobedience of the court, his conduct could not possibly be considered

"contumacious". *Green*, 589 F.2d 248. [citing, *Loon v. Charles W. Bliven and Company, Inc.*, 534 F.2d 44, 48 (5th Cir. 1976)]. In the case at bar, the fact that counsel was suffering from ill health which continuously worsened throughout the length of the proceeding, preventing her from assisting her client at depositions, was never disputed by Respondent or for that matter the district court. Evidently, the trial court simply believed that it was not a legitimate excuse for non-attendance.

Such a supposition in clearly arbitrary. The record plainly demonstrates that in the midst of a severe illness, counsel diligently set about to refer this and other cases to new counsel in an effort to avert any possible prejudice to her client, as well as to impress to the court that counsel was not indifferent to her responsibilities. Counsel's efforts were rewarded by the offensive tactics of opposing counsel and the indifference of the trial court. The Disciplinary Rules of the Pennsylvania Code of Professional Responsibility, states that attorneys should accede to the reasonable requests of opposing counsel which do not prejudice the rights of their client, by avoiding offensive tactics and by treating with courtesy and consideration all persons involved in the legal process D.R. 7-101(A)(1). Throughout these proceedings, the Respondent as well as the courts failed to demonstrate how a sixty (60) day request for delay on the part of Petitioner's counsel in order to obtain replacement counsel would result in an undue prejudice for the Respondent in a case which was merely five (5) months old at the time of the first request. The absence of prejudice to Respondent, as well as the absence of "wilfullness" and/or "bad faith" on the part of counsel demonstrates that the district court's sanction of dismissal herein amounted to an abuse of discretion under Federal Rule of Civil Procedure 37(b)(2) which violated Petitioner's due process right to counsel as well as a fair hearing on the merits of her action.

## III. THE COURT BELOW FAILED TO FOLLOW CLEAR JUDICIAL PRECEDENT WHEN IT DISMISSED PETITIONER'S ACTION FOR CONDUCT WHICH DID NOT MEET THE NECESSARY CULPABILITY TO SUSTAIN THE ORDER.

The Petitioner maintains that the U.S. Court of Appeals for the Third Circuit has misapplied its own guidelines for the imposition of the sanction of dismissal. In making an effort to balance the equities involved in the case herein, the court unilaterally overlooked essential facts clearly reflected within the record.

The Third Circuit in *Poulis v. State Farm and Casualty*, 747 F.2d 863 (3rd Cir. 1984), set forth that a district court must first balance and consider, on the record, six factors before exercising its discretionary power to dismiss. These are as follows:

1. the extent of the party's personal responsibility;

2. the prejudice to the adversarial counsel by the failure to meet scheduling orders and respond to discovery;

3. a history of dilatoriness;

4. whether the conduct of the party or the attorney was willful or in bad faith;

5. the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and

6. the meritoriousness of the claim or defense.

*Poulis*, 747 F.2d at 865.

The Third Circuit failed to apply these factors when considering the facts in the case at bar. A brief discussion of these factors illustrate that the district court abused its discretion when it imposed the sanction of dismissal upon Petitioner's action.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 85-1530

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MARIE A. ALLEN

*vs.*

CHILTON CO.

Marie A. Allen

*Appellant*

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Dear Counsel:

Enclosed herewith is conformed copy of order filed today in the above-entitled case.

Very truly yours,

Sally Mrvos, Clerk

By: _____

*Betty J. Robinson*
*Deputy Clerk*
*(Direct Dial 597-3134)*

Dated: July 14, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1530

MARIE A. ALLEN,

*Appellant*

*v.*

CHILTON CO., DIVISION OF A.B.C., INC.,

*Appellee*

(Civil No. 84-4852)

SUR PETITION FOR REHEARING IN BANC

PRESENT: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

*Circuit Judge*

Dated: July 14, 1986

**1. Party's Personal Responsibility**

Under the first *Poulis* factor, the district court erroneously concluded that the Petitioner herself should bear personal responsibility for the delay in the proceedings when she failed to attend a deposition, unilaterally scheduled by the Respondent, for June 10, 1985. The district court, on May 13, 1985, issued an order directing Petitioner to obtain new counsel by May 31, 1985. The order also directed Petitioner to attend any scheduled deposition thereafter regardless of whether or not replacement counsel was retained. The Petitioner maintains that the May 13, order was unreasonable and arbitrary since it imposed an unreasonably restricted deadline in which to find replacement counsel experienced in handling Title VII matters. The district court's order allowed the Petitioner only fifteen days to find new counsel with a clear enough calendar to adequately prepare Petitioner as well as him/herself for depositions scheduled for June 10, 1985. The Order was especially harsh in light of the fact that there was no prior evidence of bad faith conduct by the Petitioner herself during the course of these proceedings and that any prior delays were strictly the result of her counsel's physical incapacity, of which the trial court was duly informed.

As for Petitioner's failure to attend the June 10, depositions, counsel maintains that Petitioner herself should not be penalized for such, due to the fact that she was still acting on the advice of her counsel who, concerned that her client would be unfairly intimidated in appearing without counsel, directed Petitioner not to attend the deposition pending the disposition of counsel's Motion for Reconsideration, which was filed on May 28, 1985.

The Petitioner concedes that she was ill-advised, since the proper action for her counsel in such a situation would have been to title the motion as a Motion for Protective Order. Considering the fact counsel was hospitalized through June 6, 1985 the trial court should have granted

counsel's motion simply on the basis that counsel's ill health precluded her from effectively representing her client. For the trial court to penalize the Petitioner herself merely for following the legal advice of her incapacitated counsel, is unfair. It is extreme of the court to suggest that the Petitioner, who is inexperienced in legal matters, should be expected to recognize that the proper relief in her situation would have been a Motion for Protective Order. To sanction Petitioner for contumacious conduct simply for relying on an erroneously titled motion for relief, is unjust.

According to the Supreme Court in *National Hockey League v. Metropolitan Hockey Club,* Inc. 427 U.S. 639 (1976), the extreme sanction of dismissal should be upheld only when "flagrant bad faith" on the part of the Petitioner as well as "callous disregard" by counsel of his/her responsibilities is found. *Id,* 427 U.S. at 643. The record does not demonstrate how either Petitioner's conduct or that of her counsel rises to the level expounded by this Court in *National Hockey League.* To attribute "flagrant bad faith" conduct upon Petitioner merely for following the advice of her incapacitated counsel and for relying on an incorrectly titled motion intended to prevent Petitioner from having to attend a deposition without the assistance of counsel, is clearly an abuse of discretion.

**2. Prejudice to the adversarial counsel by the failure to meet Scheduling Orders and respond to discovery.**

The second *Poulis* factor involves "prejudice" to the Respondent by Petitioner counsel's conduct. The Third Circuit, in an opinion handed down contemporaneously with the *Poulis* decision stated that in order for a party to suffer true prejudice by an adversary's failure to engage in discovery, there has to exist some factor that would bear substantial weight in support of a dismissal or default judgment. *Scarborough v. Eubanks,* 747 F.2d 871, 878 (3rd Cir. 1984). "Examples of such prejudice are the irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or

the excessive and possibly irredeemable burdens or costs imposed by the opposing party.

There is no evidence in the record which demonstrates that there has been an irretrievable loss of evidence or that even one witness had forgotten one fact, or for that matter, that any excessive burden or costs were imposed upon Respondent by the Petitioner. The Respondent maintains that it was "prejudiced" by Petitioner counsel's failure to immediately pay the Three Hundred Dollars ($300.00) costs, imposed by the trial court on March 27, 1985, and by the excessive" length of delay, which allegedly, would monetarily burden the Respondent if Petitioner were to be awarded damages for back pay.

The trial court essentially abused its discretion for imposing costs on Petitioner's counsel by failing to demonstrate any "bad faith" conduct on the part of Petitioner's counsel as dictated by this Honorable Court in *Roadway Express v. Piper.* 447 U.S. 752 (1980), and for essentially rewarding Respondent for filing a motion which was never intended as a prayer for relief, but was instead, an offensive tactic designed to take advantage of counsel's debilitating circumstances. Respondent had already received notice from counsel that she was requesting withdrawal from the proceedings due to failing health.

Secondly, to maintain that the district court's sanction of dismissal should not be reversed because it could possibly result in burdening Respondent with extended back pay damages, is convoluted reasoning. In order to be prejudiced monetarily the Respondent must demonstrate excessive costs frivolously or vacuously imposed by the Petitioner during the course of the proceedings.

In its opinion, the Third Circuit maintains that the Respondent was prejudiced by Petitioners failure to cooperate "in areas where the plaintiff should cooperate under the spirit of the federal procedural rules". *Allen v. Chilton Co.*, Slip op at 6 [citing *Poulis*, 7747 F.2d 878]. To impose upon

Petitioner a responsibility to cooperate in keeping with the "spirit of the federal procedural rules" without imposing a similar good faith effort on the Respondent, neglects basic principles of fundamental fairness and equity upon which due process rests. Had that responsibility been apportioned to both parties, substitute counsel's appearance would have been entered long ago, without prejudice to either party, and this Honorable Court would not be considering this Petition today.

**3. History of Dilatoriness**

Under the third *Poulis* factor, the Third Circuit failed to convincingly demonstrate how counsel's conduct could remotely be characterized as dilatory. For at least four months, counsel repeatedly informed and re-informed the district court and Respondent of her illness and need to withdraw, requesting time to find suitable replacement counsel. Counsel repeatedly tried to enlist the trial court's and Respondent's cooperation in this regard. The delays were not the result of Petitioner counsel's procrastination, indifference and/or disregard of discovery, but instead, the result of an absence of cooperation between the parties. Petitioner's counsel made every conceivable effort to secure new counsel, and, on two different occasions, succeeded, only to be subsequently stymied by the trial court's, as well as opposing counsel's inflexibility in failing to allow new counsel time to become acquainted with the file as well as time to clear their calenders for proper representation.

In its opinion, the court below states that though they were not "unmindful of Thompson's illness", it finally could not "excuse" a delay of over six (6) months during which no progress was made toward adequate litigation of this case." *Allen v. Chilton Co.* No. 85-1530 Slip op. at 7 (3rd Cir. June 11, 1986). Needless to say, if the trial court was similarly "mindful" of Petitioner's counsel's illness, there would only have been a sixty (60) day delay to find replacement counsel.

Furthermore, despite these mitigating circumstances, the Court of Appeals appears to believe that the six (6) month period of delay was too long to tolerate. To the contrary, courts have consistently held that dismissal with prejudice is particularly disfavored with relatively young cases, such as the case at bar. *See, e.g., Ruiford v. Pounds,* 640 F.2d 944 (9th Cir. 1981); *Webber v. Eye Corp.,* 721 F.2d 1067 (7th Cir. 1983); *Gonzales v. Firestone Tire and Rubber Co.,* 610 F.2d 241 (5th Cir. 1980). In *Gonzalez,* the Fifth Circuit held that dismissal of a case less than ten months after the complaint was filed was an abuse of discretion. In *Webber,* the Seventh Circuit held that there was an abuse of discretion when the record did not indicate a clear record of delay or contumacious conduct, the case being barely eighteen (18) months old when dismissed with no evidence that defendant would have been unduly harmed or prejudiced had the court granted plaintiff's request for continuance. *Webber,* 721 F.2d at 1070.

This High Court in *Ungar v. Sarafite* 376 U.S. 575, (1964), has previously declared, that "an unreasonable and arbitrary insistence upon expeditiousness in the face of a justified request for delay violates the [due process] right to the assistance of counsel. *Ungar,* 376 U.S. at 589. Though some consideration should be given to the district court's concern for disposing its caseload expeditiously, justice cannot be "impaired by such close inflexible attention to the docket. *Petterson v. Term Taxi, Inc.,* 429 F.2d 888, 891 (2d Cir. 1970).

Upon such considerations, the court in *Scheick v. Bear, Stevens and Co, Inc.,* 583 F.2d 58 (2d Cir. 1978), held that there was abuse of discretion when there was dismissal of a thirteen month old case due to the eleven month inactivity of plaintiff's counsel. In *Flaska v. Little Marine Construction Co.,* 389 F.2d 885 (9th Cir. 1968), *cert. denied,* 392 U.S. 928 (1968), the court held dismissal of a case less than one year old to be an abuse of discretion, even though plaintiff's counsel delayed eight months in pursuing the case and twice

failed to appear or send a prepared substitute to pre-trial conferences.

Similarly, in the case at bar, while there is some evidence of delay in the proceedings, five or six months is hardly a length of time sufficient to warrant the drastic sanction of dismissal, especially in light of the mitigating circumstances present herein.

**4. Willfulness or Bad Faith Conduct**

The fourth *Poulis* factor to be reviewed is whether or not counsel's conduct, at any time in these proceedings could be characterized as contumacious. As previously noted, the Supreme Court in *National Hockey League,* deemed the sanction of dismissal appropriate only where a party's conduct evidenced "flagrant bad faith" and a "callous disregard of responsibilities" by counsel. *Id.* 427 U.S. at 643. The Court of Appeals, under this factor, believes that counsel's instructions to her client not to obey the outstanding order to attend the scheduled deposition is evidence of willfulness and bad faith. The panel also places considerable emphasis on the inability of counsel to find a replacement in a four-month period of time. However, there was no "four month period of time" during which there was no activity on the case such that replacement counsel could enter an appearance. Moreover, the court mistakenly believes that counsel communicated with no more than one or two firms for this purpose. *Allen v. Chilton Co.* No. 85-1532 Slip op. at 8 (3d Cir. June 4, 1986). The affidavit of counsel's secretary, Barbara Cummings, included in the record below, clearly states that she made "numerous" contacts in an effort to find replacement counsel. The list of counsel contacted by Ms. Cummings include, inter alia Holly Maguigan, Esquire; Alan Epstein, Esquire; Edmund A. Tiryak, Esquire, Gary Green, Esquire; and Robert Davitch, Esquire and Alice Ballard, Esquire.

Further the Court of Appeals fails to consider the climate of hostility and lack of cooperation by opposing coun-

sel, coupled with the constant and repeated threat of sanctions by the district court. The simple truth of the matter is that had not Respondent filed its Motion for Sanctions in March of 1985, and had not the district court refused to grant counsel's reasonable request for delay, attorneys Green and Davitch of Sidkoff, Pincus and Green, would have been able to enter their appearance in April, 1985, thus avoiding entirely all subsequent delays. The alleged "bad faith" in these proceedings did not begin as the court believes, on June 10, 1985, when Petitioner failed to appear, but much earlier, in March 1985, when opposing counsel began its offensive tactics. Instead of questioning why Petitioner could not find replacement counsel after June 10, 1984 or up to the time of dismissal, the court should ask why the District Court and opposing counsel refused to grant Petitioner's counsel her reasonable and justifiable request for extension of time in order to allow attorneys, Green and Davitch time to clear their calendar and acquaint themselves with the file. Considering the fact that the district court began threatening the sanctions of dismissal as early as March 27, 1985, one should have been able to demonstrate "bad faith" conduct by Petitioner or "callous disregard of responsibilities" by counsel at the time of the district court's first order on March 27, 1985. Since the record demonstrates that counsel's conduct could not possibly be characterized as contumacious as of that time (or any other time), the Court of Appeals should have regarded the district court's inflexibility as an abuse of discretion.

**5. Alternative Sanctions:**

In dismissing the fifth *Poulis* factor relating to alternative sanctions, the Court of Appeals concludes that alternative sanctions to dismissal would have been ineffective herein due to the fact that the Three Hundred Dollars ($300.00) in costs imposed on counsel by the district court on March 27, 1985, had not been paid. Both these premises are incorrect. Although the Three Hundred Dollars ($300.00) in costs was not immediately paid by counsel, it

was nevertheless, paid in February, 1986, considerably prior to the Court of Appeals' decision.

Besides ignoring the fact that the district court abused its discretion by imposing costs absent a finding of "dilatoriness" and/or "bad faith", the Court of Appeals also ignores any consideration of what sanctions could have been imposed as an alternative to dismissal. Such an "extreme sanction" should only be used as a last resort after consideration of all possible alternative. Since the district court originally imposed costs as sanctions against counsel for allegedly dilatory conduct, the court of appeals should have discussed what effective alternatives remained which could have penalized counsel for her failing health and still have preserved Petitioner's cause of action.

**6. Merits of this Claim:**

The last *Poulis* factor states that "a claim or defense will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by the plaintiff or would constitute a complete defense." *Poulis*, 747 F.2d at 870. The Petitioner maintains that under this standard there is merit to her claim since the allegations, if proven, would support recovery on her behalf. Indeed, the district court admitted that there was merit to Petitioner's claim when it denied Respondent's motion for dismissal, on May 13, 1985.

## CONCLUSION

Every party in a civil action has a due process right to have their case heard and disposed of on the merits whenever practicable. *Hritz v. Woma Corp.*, 732 F.2d 1128, 1181 (3rd Cir. 1984). This right is integrally related to a party's due process right to the assistance of counsel at all points of the proceedings. The Petitioner respectfully maintains that this right was abridged by the district court's refusal to allow Petitioner's counsel the requested time needed to find

suitable replacement counsel in order that Petitioner could properly be represented during discovery.

WHEREFORE, in consideration of the Constitutional rights herein at issue, Petitioner most respectfully prays that this Honorable Court grant this Petition for Writ of Certiorari and issue an Order allowing the within matter to stand for briefing on the merits, oral argument and plenary consideration by this Court and directing the Court below to certify and transmit the record.

Respectfully submitted,

BEVERLY K. THOMPSON, P.C.

BY: _____

Beverly K. Thompson, Esquire
Attorney for Petitioner

# APPENDIX A

# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 85-1530

---

MARIE A. ALLEN

*vs.*

CHILTON CO., DIVISION OF A.B.C., INC.

Marie A. Allen,

*Appellant*

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Civil No. 84-4852

Argued June 4, 1986

Before: ADAMS, WEIS, and HIGGINBOTHAM,
*Circuit Judges*
(Filed June 11, 1986)

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BEVERLY K. THOMPSON (Argued)
Thompson, Laureda & Bosch
Philadelphia, Pennsylvania
— Attorney for Appellant

LEONARD DUBIN (Argued)
MARK BLONDMAN
Blank, Rome, Comisky & McCauley
Philadelphia, Pennsylvania
— Attorneys for Appellee

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Opinion of the Court

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**PER CURIAM**

In this employment discrimination action, the district court dismissed the complaint with prejudice because of plaintiff's failure to comply with the court's discovery orders. We will affirm.

## I.

Plaintiff Marie A. Allen initiated this action on October 9, 1984, alleging that her employer, defendant Chilton Co., abridged rights afforded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), the Equal Pay Act of 1963, 29 U.S.C. § 206 (1982), and the Pennsylvania Human Relations Act, 42 Pa. Cons. Stat. Ann. § 951 et seq. (Purdon 1981). Although the suit was styled in the complaint as a class action, no class was certified and a motion for class certification was never filed.

On November 20, 1984, counsel for defendant notified opposing counsel that the deposition of plaintiff had been scheduled for December 7, 1984. Plaintiff's counsel, Beverly K. Thompson, Esq., informed defendant's counsel that she, Thompson, was ill and requested a postponement. The deposition was rescheduled for January 24, 1985, but on that date the proceeding was again postponed as a result of a personal emergency involving Thompson but not related to her medical condition.

Subsequently, defendant's counsel notified Thompson that the deposition would be rescheduled for February 6, 1985. Defendant insists that it never received notice that this date was unacceptable to plaintiff, but Thompson's secretary stated in an affidavit that the secretary telephoned defendant's counsel in advance of February 6 and told him plaintiff did not agree to be deposed on that date. In any event, defendant's trial counsel, corporate counsel, and a stenographer were present on February 6 at the designated

Philadelphia location, and neither plaintiff nor her attorney appeared.

On March 14, 1985, Thompson wrote to the district court stating that her continued illness left her unable to represent plaintiff, and that she was seeking replacement counsel. The next day, on March 15, defendant filed a motion for sanctions. The district court entered an order on March 27, 1985, assessing $300 in costs on Thompson, ordering plaintiff to appear for a deposition upon five days written notice, and permitting plaintiff to retain other counsel if her own attorney could not appear. The order warned: "Plaintiff's failure to attend the deposition and answer proper questions will subject her to the sanction of dismissal of this action."

Pursuant to this order, defendant gave notice that it would depose plaintiff on April 8, 1985. Again, defendant's representatives waited in vain on that date for plaintiff's appearance. Thompson insists that she had asked defendant's counsel to postpone the deposition, because potential replacement counsel had other obligations on April 8, and that request was refused. She advances no other reason for failing to obey the court's March 27 order.

Defendant filed a second motion for sanctions on April 17, 1985. On May 1, 1985, Thompson filed an untimely response in the form of a motion to place the matter on inactive status for sixty days while other counsel was retained. On May 8, an attorney in the firm of Sidkoff, Pincus & Green filed a certification stating that his firm would enter an appearance on plaintiff's behalf, but only if the court granted the requested sixty-day delay. The attorney stated that other commitments prevented any earlier participation by his firm.

The district court entered its second order on May 13, 1985. The order, sent to plaintiff personally as well as to Thompson, directed plaintiff to obtain new counsel by May 31, 1985, and permitted defendant to schedule a deposition

after June 10, 1985 upon five days written notice. The court declared that plaintiff was required to appear for the deposition whether or not she had retained new representation.

Thompson filed an untimely motion for reconsideration on May 24, 1985, and when defendant scheduled the deposition for June 10, 1985, she instructed her client not to appear. Although defendant's counsel notified Thompson on June 6, 1985 that the district court's order was not affected by the motion to reconsider, plaintiff did not appear for the deposition on June 10.[1] Thompson informs this Court that she was hospitalized and heavily medicated from April 25 through June 6, and that she dictated her May 1 and May 24 motions from her hospital bed. She states that the pressure placed on her by defendant's motions forced her to direct her attention to responding to those motions, instead of seeking replacement counsel. Defendant filed a third motion for sanctions on June 17, 1985, and on August 1, 1985 the district court ordered dismissal pursuant to Fed. R. Civ. P. 37(b)(2)(C). As of August 1, no new attorney had filed an appearance on plaintiff's behalf, and the $300 sanction imposed on Thompson on March 27 had not been paid. Plaintiff filed a timely appeal.[2]

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1. The district court intimated that it did not respond to the motion for reconsideration because it was untimely. Thompson argues unconvincingly that the motion should have been contrued as seeking a protective order.

2. Counsel for defendant brings to our attention that this Court recently affirmed the dismissal of a separate case because of Thompson's failure to cooperate in discovery. Ennis v. New Jersey Bell Telephone Co., 782 F.2d 396 (3d Cir. 1985). The fact that the same attorney was involved in that matter has no bearing on our decision in the present appeal.

## II.

The imposition of sanctions for discovery abuses is within the discretion of the district court. *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984). However, the use of dismissal as a sanction is "extreme" and "drastic," *id.* at 867, and "doubts should be resolved in favor of reaching a decision on the merits. . . ." *Scarborough v. Eubanks*, 747 F.2d 871, 878 (3d Cir. 1984).

*Poulis* dictates that the district court balance six factors in deciding whether dismissal is appropriate:

> (1) the extent of the *party's* personal *responsibility;* (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith;* (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions;* and (6) the *meritoriousness* of the claim or defense.

747 F.2d at 868 (emphasis in original). In this matter, the district court carefully reviewed each of these factors and decided that dismissal was appropriate. We do not believe that such an analysis represents an abuse of discretion.

First, the court held that plaintiff herself was at least partly responsible for the delay, since the May 13, 1895 order was sent to her personally and expressly directed that she appear for a deposition with or without counsel. Thompson insists that plaintiff should not be held responsible for following her counsel's instructions, but Thompson's improper advice does not excuse plaintiff's disregard of a clear court order.

Second, the district court held that plaintiff's failure to cooperate in "one of the most basic areas of discovery" prejudiced defendant. This is consistent with *Poulis*, which found sufficient prejudice where "defendant encountered

lack of cooperation from the plaintiff in areas where the plaintiff should cooperate under the spirit of the federal procedural rules." *Id.* at 868. For eight months prior to dismissal, defendant sought discovery to which it was entitled, and there was no indication that it would succeed in obtaining it.

Third, the history of dilatoriness is manifest. Plaintiff's deposition was scheduled five times over a period of six months without ever taking place. In addition, Thompson either did not respond or filed untimely responses to several motions, and she failed to comply with two court orders. The district court also criticized plaintiff's co-counsel, Joel A. Slomsky, Esq., for not acting to ameliorate the situation before he withdrew his appearance on April 1, 1985. Thompson claims that Slomsky was not experienced in Title VII matters; nevertheless, we cannot say that the district court erred in relying on a competent attorney who had entered a general appearance. Finally, while we are not unmindful of Thompson's illness, we cannot excuse a delay of over six months during which no progress was made toward adequate litigation of this case.

Fourth, the district court stated: "A review of the entire record convinces me that counsel for plaintiff's conduct was willful." The court observed that Thompson's untimely motion for reconsideration of the May 13 order was mostly a discussion of the sanction of dismissal, which had not been ordered; this suggested that Thompson did not intend to comply with the court's order. Further, her express instruction that her client not obey the outstanding order is evidence of willfulness and bad faith. Thompson insists the underlying problem was the difficulty of finding replacement counsel capable of complex Title VII litigation, but this does not explain why in over four months—from her March 14 letter informing the court of her search for other counsel to dismissal on August 1—no counsel was found in or near the city of Philadelphia.

Indeed, the failure during this lengthy period to obtain replacement counsel is striking. There is no evidence in the record that plaintiff communicated with more than one or two firms, although we presume that many lawyers would be interested in undertaking an employment discrimination class action. In light of this belief, we cannot conclude that the district court abused its discretion in refusing to accommodate the particular demands of one possible replacement firm, and to delay the action further.

Fifth, *Poulis* held that the imposition of costs directly on a dilatory attorney is "[t]he most direct and therefor preferable sanction. . . ." 747 F.2d at 869. However, the district court had already imposed $300 in costs on Thompson, and the fact that this reasonable fine had not been paid and had not affected the attorney's behavior demonstrated the ineffectiveness of such a sanction in this case.

Sixth, the district court observed that plaintiff's underlying claim appears "meritorius," under the lenient *Poulis* definition that a claim is meritorius "when the allegations of the pleadings, if established at trial, would support recovery by plaintiff. . . ." *Id.* at 870. The court expressed the opinion, however, that the presence of a meritorious claim alone should not condone the willful disregard of discovery obligations. We agree. The only way to litigate a claim in federal court, however meritorious it may be, is to follow the court's rules. Here, after giving plaintiff several chances to act appropriately the district court decided that such cooperation was highly unlikely.

All of the district court's conclusions—concerning plaintiff's knowledge and participation, the prejudice to defendants, the history of dilatoriness, the willful violation of a court order, and the ineffectiveness of milder sanctions—are supported by the record, and, taken together, they support the district court's decision.

Plaintiff's position is not wholly unsympathetic. The May 13 personal notice to her to find an attorney gave her

only a few weeks in which to do so, and this may have been somewhat difficult. However, the allowance of such time was not unreasonable given the district court's belief that diligent efforts to find replacement counsel were not being made. That belief was confirmed when no new appearance was entered and plaintiff made no attempt to participate in discovery by August 1, nearly three months after the May 13 order, and nearly two months after Thompson left the hospital.

The district court provided plaintiff and her counsel with several opportunities to correct their dilatory behavior, and also sought to utilize lesser sanctions before ordering dismissal. Its actions were not an abuse of discretion.

## III.

The judgment of the district court will be affirmed.

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TO THE CLERK:

Kindly file the foregoing per curiam opinion, not for publication.

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*Circuit Judge*

# APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MARIE A. ALLEN | : | |
| | : | |
| *v.* | : | Civil Action No. 84-4852 |
| | : | |
| CHILTON CO., Division of A.B.C., INC. | : | |

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, J. July 30, 1985

Defendant has filed a motion for sanctions seeking dismissal of plaintiff's complaint for failure to obey an order of this court requiring her to appear for a deposition. The court is aware that the law generally, and our court of appeals particularly, favors disposition of claims on their merits. Nevertheless, the facts of this case compel the unusual step of granting the ultimate sanction available—dismissal of plaintiff's complaint. Because the extreme sanction of dismissal is to be imposed, the circumstances leading to dismissal will be set forth in detail.

Plaintiff's complaint was filed on October 9, 1984. The complaint alleged violations of the Equal Pay Act, 29 U.S.C. §206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17, and the Pennsylvania Human Relations Act (PHRA), Pa. Stat. Ann. tit. 43 §§951-963 (Purdon 1964 & Supp. 1984). The complaint was filed on behalf of plaintiff and purported to represent a class of persons similarly situated. No class was ever certified, nor was any motion for class certification ever filed. Plaintiff's complaint was filed by Beverly K. Thompson, Esquire. Joel H. Slomsky, Esquire, entered an appearance as co-counsel for plaintiff on October 12, 1984, but upon motion, withdrew from the case on April 2, 1985.

On October 25, 1984, counsel for defendant Chilton Company, Division of American Broadcasting Companies, Inc. (Chilton), filed an entry of appearance and a motion for extension of time to answer the complaint. Defendant's motion was unopposed and was therefore granted. An answer was filed on November 29, 1984. Defendant also filed a motion to dismiss plaintiff's PHRA claim simultaneously with the filing of the answer. On November 29, 1984, plaintiff filed a motion for extension of time to respond to defendant's motion to dismiss. Plaintiff requested additional time, according to her motion, because Ms. Thompson "was admitted to Graduate Hospital for major surgery" on October 18, 1984, and "suffered serious post-operative complications and remained hospitalized until November 17, 1984, when she was discharged to complete bed rest at home for no less than six weeks." Moreover, the motion stated that "[p]ursuant to her physician's orders, plaintiff's counsel will not return to her practice until sometime in January, 1985."

I did not act on plaintiff's motion for extension of time. Rather, without benefit of a response from plaintiff, I entered a memorandum opinion and order, dated December 13, 1984, denying defendant's motion to dismiss the PHRA claim, thus mooting plaintiff's motion for extension of time.

On March 15, 1985, defendant filed a motion for sanctions seeking, inter alia, dismissal of plaintiff's complaint for failure to appear at her noticed deposition. In its motion, defendant's counsel represented that a notice of plaintiff's deposition to take place on December 7, 1984 was served on plaintiff's counsel on November 20, 1984. The motion for sanctions further set forth that, at counsel for plaintiff's request, the deposition was rescheduled to January 24, 1985. On January 24, 1985, someone in plaintiff's counsel's office advised defendant's counsel that, due to a personal emergency, Ms. Thompson could not appear at the scheduled deposition. Defense counsel was evidently advised that the deposition could take place either February 4, 1985 or February 6, 1985. By letter dated January 29, 1985, defense

counsel notified plaintiff's counsel that the deposition would proceed on February 6, 1985, unless counsel was advised to the contrary. Defendant's counsel, according to the March 15, 1985 motion for sanctions, filed such motion only after repeated unsuccessful attempts to reschedule the deposition.

According to defendant, counsel for plaintiff did not notify defense counsel that the deposition would not take place on February 6, 1985. Defendant's trial counsel, corporate counsel and a court reporter were present at defense counsel's offices to take plaintiff's deposition. Neither plaintiff nor her counsel were present. Defendant thereafter filed the March 15 motion for sanctions.

Upon the expiration of the time required for responding to defendant's motion, *see* Local Rule of Civil Procedure 20(c), and having received no response from plaintiff,[1] I entered an order on March 27, 1985. The order provided in full:

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1. The court did receive a letter from plaintiff's counsel on March 18, 1985, which was dated March 14, 1985, and provided in full as follows:

> Dear Judge Van Artsdalen:
>
> As your Honor is already aware, plaintiff's counsel in the above entitled cause [sic], Beverly K. Thompson, Esquire, was admitted on October 18, 1984 to Graduate Hospital for major neurosurgery. As a result of severe post-operative complications and although she has attempted to do so, plaintiff's counsel has yet to return to her practice. Rather than risk the chance that the Court perceive that we are merely not acting on the matter, we ask that the case be placed on an in-active status until either plaintiff's counsel returns to practice or we forward the case to another attorney.
>
> Thank you for your courtesy and cooperation.

The letter was written on Ms. Thompson's stationery and was signed for her by someone with the initials "B.C." Because the letter was not a motion, and not in conformity with Local Rule 20 as to motion practice, it would have been inappropriate for me to enter any order or take any formal action in respect to the communication.

It is Ordered that defendant is entitled to take the oral deposition of Marie A. Allen upon five days' written notice to Marie A. Allen and her attorney, to be taken at the offices of defense counsel during regular working hours.

It is further Ordered that if plaintiff's counsel is unable, because of medical or any other reason, to attend such deposition as may be scheduled, the plaintiff may obtain the services of some other attorney. The inability of plaintiff's attorney to attend the deposition shall not be grounds for a continuance. Plaintiff's failure to attend the deposition and answer proper questions will subject her to the sanction of dismissal of this action.

It is further Ordered that plaintiff's counsel shall pay to defendant the sum of Three Hundred Dollars ($300.00) for defendant being required to file the motion for sanctions, it appearing from defendant's unanswered motion for sanctions that plaintiff's counsel never advised defense counsel that she would not attend the scheduled deposition.

On April 17, 1985, defendant again filed a motion for sanctions seeking dismissal of plaintiff's complaint for failure of plaintiff to appear at her deposition, scheduled in accordance with the court's order of March 27, 1985. Defendant represented that in accordance with the court's order of March 27, 1985, notice of plaintiff's deposition had been served on plaintiff's counsel on March 28, 1985. The deposition was therein scheduled to be held April 8, 1985. Neither plaintiff nor her attorney appeared for the deposition.

Although under Local Rule of Civil Procedure 20(c) a response to defendant's second motion for sanctions was due on April 29, 1985, plaintiff once again failed to respond timely. Rather, on May 1, 1985, plaintiff filed a pleading entitled, "Motion For Leave To Place The Matter On An In-

Active Status Pending Referral." Plaintiff's motion recited continuing health problems of Ms. Thompson and referred to the March 14, 1985 letter sent to the court.

The motion also referred to a March 29, 1985 letter from Ms. Thompson to defendant's counsel, a carbon copy of which was sent to the court. In that letter Ms. Thompson represented that her client, because of Ms. Thompson's health problems, would be better off with new counsel. The letter further stated:

> Lastly, I am advised that an Order has been entered directing my client to appear for a deposition on five (5) days notice. Since we are making every effort to transfer this file to another attorney as quickly as possible, I would request that, upon notification that same has been accomplished, you would give the new attorney a reasonable chance to review the file and cooperate. As for the sanction imposed upon plaintiff's counsel, I believe it to be patently unfair, particularly in light of my letter to both his Honor and you dated March 14, 1985. I understand that the Order was entered because I failed to respond to defendant's Motion. I would merely point out, for the record, that had I been well enough to timely file a response, I would not have sent the letter of March 14, 1985 requesting that the case be placed on inactive status until we could refer it to new counsel. Nevertheless, I will pay you the $300.00 as the Judge ordered, as soon as I have it. Since I have been so disabled for such a long while, my income is severely limited right now.

Plaintiff's motion, filed May 1, 1985, also stated that plaintiff's counsel had spoken to two attorneys "who are presently reviewing the file" and "[i]t is anticipated that new counsel will be substituting their appearance within the next few weeks."

Following receipt of defendant's response to plaintiff's motion, I entered a memorandum and order on May 13,

1985. In a four-page memorandum, after briefly reciting the history of the case to that point, I stated:

> Once a case is filed, it is the responsibility of the attorney to take reasonable measures to bring the case to trial or other appropriate final determination. The court would be completely justified in dismissing this action. As part of the order of March 27, 1985, I ordered plaintiff's counsel to pay $300 to defendant as costs for the motion for sanctions. Plaintiff's counsel, by letter to defendant's counsel, a copy of which was forwarded to me, acknowledged receipt of the order and professed financial inability to pay the $300 sum at this time. Monetary sanctions against plaintiff and her counsel are thus rather obviously ineffective, and no sanction less than dismissal is likely to provide defendant with the relief to which defendant is probably entitled.
>
> Nevertheless, dismissal at this time may leave the plaintiff-litigant without an effective remedy for what, based upon the allegations of the complaint, may be a valid cause of action for violation of federal law. Instead, I will afford plaintiff a limited opportunity to obtain other counsel, and submit to a deposition by defendant.

The Order accompanying the memorandum provided:

> It is ordered that plaintiff shall have until and including May 31, 1985, to obtain, if she so desires, other counsel to represent her in this matter. Whether plaintiff obtains other counsel to represent her, the defendant may take the oral deposition of Marie A. Allen upon five days' written notice by mail provided to her personally, and to any counsel who is then attorney of record for her by reason of having filed of record a pleading on her behalf or an appearance for her and which has not been duly withdrawn. Notice shall be deemed effective for the purpose of calculating the five days' notice upon the mailing of such notice. Said oral

deposition may be scheduled for any working day commencing on or after June 10, 1985. In all other respects the order of March 27, 1985, shall remain in full force and effect.

It is further ordered that a copy of this order shall be mailed to Marie A. Allen at her address of record, as well as to her attorney.

On May 28, 1985, plaintiff filed a lengthy motion to reconsider the court's order of May 13, 1985.[2] The motion for reconsideration was not timely filed. *See* Local Rule of Civil Procedure 20(g). Defendant filed a brief in opposition to plaintiff's motion to reconsider on June 4, 1985.

On June 17, 1985, defendant filed its third motion for sanctions again seeking dismissal of plaintiff's complaint. Defendant represents that on June 3, 1985, notices of deposition were mailed to plaintiff and Ms. Thompson, plaintiff's only counsel of record on that date. On June 6, 1985, plaintiff's counsel caused a letter to be delivered to defense counsel in which she requested that plaintiff's deposition be rescheduled pending disposition of her motion for reconsideration. Defendant's counsel declined to reschedule. Plaintiff's counsel thereafter notified defendant's counsel that neither she nor her client would attend the scheduled June 10, 1985 deposition. Neither plaintiff nor her counsel appeared at the noticed deposition. The present motion seeking dismissal was thereafter filed.

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2. The three-page motion was accompanied by an unpaginated twenty-two page brief plus several other documents. The brief was somewhat puzzling. Fifteen of its twenty-two pages were devoted to the argument why this court could not dismiss plaintiff's complaint. The argument puzzled me because the order of May 13 *did not* dismiss the complaint. There was no reason to address, in a motion to reconsider, something that had not been ordered. Plaintiff's motion to reconsider, rather, appeared to be in anticipation of a motion to dismiss following noncompliance with the court's May 13, 1985 order. This proved a correct prognosis when plaintiff incorporated her motion to reconsider in responding to defendant's latest motion to dismiss.

The Court of Appeals for the Third Circuit recently reiterated the factors that must be balanced by the trial court when the court is considering whether to exercise its discretion and dismiss a plaintiff's action. In *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), the court set forth the six relevant factors to be considered:

> (1) the extent of the *party's* personal *responsibility;* (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith;* (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions;* and (6) the *meritoriousness* of the claim or defense.

*Id.* at 868 (emphasis in original).

Because parties generally are represented by counsel in litigation, it is often difficult to determine the extent of a party's personal responsibility. That is true here as well. Plaintiff may not have been aware of all that was taking place in this litigation after the complaint was filed, or of her attorney's derelictions. I recognized in the middle of this dispute that plaintiff should be made aware of what was occurring so she could obtain new counsel herself if she so desired. It was, therefore, my direction that notice be sent to Ms. Allen personally and the order of March 27, 1985 provided: "It is ordered that defendant is entitled to take the oral deposition of Marie A. Allen upon five days' written notice to Marie A. Allen *and* her attorney. . . ." (emphasis added). Although not articulated in the May 13, 1985 memorandum and order, one of the reasons I did not dismiss plaintiff's complaint at that point was that defendant's counsel had not sent notice directly to plaintiff.[3]

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3. Upon receipt of defendant's April 17, 1985 motion for sanctions, my law clerk placed a telephone call to defendant's counsel to determine whether notice had been sent to Ms. Allen in addition to her counsel. Counsel stated that they did not do so because of their belief that such practice, when a party is represented by counsel, may violate the Code of

I made it quite clear in the order of May 13, 1985 that notice by mail be sent to plaintiff personally, and I also took the unusual step, in a case where a party is represented by counsel, of having a copy of the order sent to plaintiff. Thus, at least since the order of May 13, 1985 was received, plaintiff has been directly advised that she had "until and including May 31, 1985, to obtain, if she so desires, other counsel to represent her in this matter." Moreover, Ms. Allen knew from the order that the deposition would proceed regardless of whether she obtained new counsel. In short, the plaintiff is personally responsible for her failure to appear at the June 10, 1985 deposition because she had notice provided to her directly.

There has been prejudice to defendant caused by counsel for plaintiff's conduct. Defendant is entitled to a reasonable and prompt opportunity to prepare its defense. Although no class has been certified, the complaint contained class action allegations that, if granted, could have dramatically increased the scope and ramifications of this litigation.[4] Defendant has unsuccessfully attempted to schedule plaintiff's deposition since November 20, 1984, a period for eight months. There have been two very express orders as to the taking of such deposition—March 17, 1985

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Professional Responsibility. I made clear in the order of May 13, 1985 that Ms. Allen was to be personally notified. I also ordered that a copy of the May 13, 1985 memorandum and order be sent directly to plaintiff.

4. This court is of course aware that pursuant to Federal Rule of Civil Procedure 23(c)(1), "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." I did not make such a determination in this case because it became apparent early that plaintiff's original counsel, for a number of reasons, was having difficulty preparing the case with a single plaintiff. I decided to await the resolution of some of the early problems in the case before making a determination on the class certification. The decision to dismiss moots the issue.

and May 13, 1985. Defendant has been stymied in its attempt to obtain what is perhaps the most basic and essential defense discovery; namely, plaintiff's deposition. Defendant has been obliged to file three motions for sanctions and has been awarded costs for one of those motions that, so far as I have been advised, has not been paid. In short, to paraphrase the *Poulis* court: defendant has encountered a lack of cooperation from plaintiff and her counsel in one of the most basic areas of discovery, an area where the plaintiff should cooperate under the spirit of the federal procedural rules.

A review of the record reveals a history of dilatoriness by plaintiff's counsel. In several instances counsel failed to respond at all to defendant's motions. On one occasion, counsel filed a motion for reconsideration that was five days beyond the time period allowed by rules of court. On still another occasion, plaintiff responded to defendant's motion by letter, a plainly inadequate response under federal and local rules of procedure. Although plaintiff offers her medical problems as justification, this court cannot accept the proffered excuse as reason for an open-ended delay. While I have no reason to question the seriousness of Ms. Thompson's condition, *from October 12, 1984 until April 1, 1985, Mrs. Thompson was co-counsel for plaintiff.* Joel H. Slomsky was co-counsel of record for that period. Yet, during that entire period, while there may be much of record excusing Ms. Thompson's prosecution of this action, there is not a single reason offered why Mr. Slomsky, as co-counsel, could not have appeared with plaintiff at her deposition noticed for February 6, 1985. Regardless of Ms. Thompson's condition, plaintiff had counsel of record from October 12, 1984 until his withdrawal on April 1, 1985, who could have appeared with her at a deposition. No justification has ever been offered to this court by anyone why co-counsel of record was not available.

Determining whether an attorney's conduct was willful or in bad faith is not an easy task. Counsel will rarely dare

to draw the court's ire by openly engaging in flagrant conduct on the record. More often than not, the willfulness or bad faith of the attorney must be determined by a review of all the circumstances and imputed to counsel by his or her conduct. This case is no exception. A review of the entire record convinces me that counsel for plaintiff's conduct was willful.

An obvious indication of counsel's willfulness involves the circumstances surrounding the most recently noticed deposition. Following defendant's second motion for sanctions for plaintiff's failure to appear for deposition, I entered the memorandum and order of May 13, 1985. The order gave plaintiff and her counsel until May 31, 1985 to secure new counsel. Plaintiff's deposition was to be scheduled on or after June 10, 1985, regardless of whether she obtained new counsel. Plaintiff's counsel thereafter filed an untimely motion for reconsideration. The majority of the brief in support of that motion was devoted to the issue before the court—whether the sanction of dismissal would be appropriate under the circumstances. There was no reason for the argument to be included in a motion for reconsideration, however, because at that time the complaint had not been dismissed. Moreover, plaintiff still had time under the Order of May 13, 1985 to obtain new counsel and/or appear at her deposition.

It seems clear from reading plaintiff's motion for reconsideration that counsel fully intended to fail to comply with the court's May 31, 1985 Order. I can posit no other reason why counsel would be concerned with dismissal at that time. This intention was confirmed when, after plaintiff failed to appear for her deposition noticed for June 10, 1985, and defendant filed a motion for dismissal, plaintiff's counsel filed a response that incorporated the motion to reconsider. It seems rather clear to me that at least as of May 28, 1985, when the motion to reconsider was filed, plaintiff's counsel had no intention of complying with this court's explicit Order of May 13, 1985.

This court is required to consider alternative sanctions to dismissal. In *Poulis*, the court of appeals clearly stated its position on the matter:

> The most direct and therefore preferable sanction for the pattern of attorney delay such as that which the district court encountered in this case would be to impose the excess costs caused by such conduct directly upon the attorney, with an order that such costs are not to be passed on to the client, directly or indirectly. This would avoid compelling an innocent party to bear the brunt of its counsel's dereliction. Dismissal must be a sanction of last, not first, resort.

*Pouis*, 747 F.2d at 869.

With the court of appeals' position in mind, I declined to dismiss plaintiff's complaint upon two earlier motions for sanctions filed by defendant. In the May 13, 1985 memorandum, I stated that costs had been imposed directly upon counsel. I also explained that plaintiff's counsel, while characterizing that order as "patently unfair," professed financial inability to pay the $300 imposed as costs. I stated in the memorandum that "[m]onetary sanctions against plaintiff and her counsel are thus rather obviously ineffective, and no sanction less than dismissal is likely to provide defendant with relief to which defendant is probably entitled." *Allen v. Chilton Co.*, No. 84-4852, slip op. at 3 (E.D. Pa. May 13, 1985). I nevertheless gave plaintiff another chance and declined to dismiss her complaint at that time. There is nothing of record that reveals whether plaintiff's counsel ever paid the original $300 imposed as costs. There is no reason, therefore, for me to believe that circumstances have changed since May 13, 1985 such that imposing monetary sanctions would be an effective deterrent. If anything, I am more firmly convinced that monetary sanctions would be a toothless remedy in this case and that dismissal, although a last resort, is entirely justified.

There is one final point that buttresses dismissal as an appropriate sanction under the circumstances. I took care early in this litigation to insure that plaintiff and her counsel were aware that the extreme sanction of dismissal was a possibility. In the first order involving this dispute, filed on March 27, 1985, I stated that "[p]laintiff's failure to attend the deposition and answer proper questions will subject her to the sanction of dismissal of this action." In the May 13, 1985 memorandum, a second warning shot was fired for plaintiff's benefit: "The court would be completely justified in dismissing this action." *Id.* slip op. at 3. If this were the game of baseball, plaintiff would be entitled to a third strike. This is not a game and plaintiff is not entitled to any more strikes. Plaintiff cannot claim that the extreme sanction imposed was a surprise.

The final factor to be considered is the meritoriousness of plaintiff's claim. I have already opined in this case that dismissal "may leave the plaintiff-litigant without an effective remedy for what, based upon the allegations of the complaint, may be a valid cause of action for violation of federal law." *Id.* slip op. at 4. For that very reason, I declined to dismiss the complaint and afforded plaintiff "a limited opportunity to obtain other counsel, and submit to a deposition by defendant." *Id.* Plaintiff declined to take advantage of the opportunity afforded to her. She is not entitled to another. The complaint will be dismissed pursuant to Federal Rule of Civil Procedure 37(b)(2)(c).

In sum, this case demonstrates a conscious and continuing effort on the part of plaintiff and her counsel to prevent defendant from obtaining discovery to which it is entitled under federal rules of procedure.

Despite representations by plaintiff's counsel on May 1, 1985, almost three months ago, that it was anticipated that "new counsel [would] be substituting their appearance within the next few weeks," no such appearance by counsel has been made. The only thing that gives me pause in dis-

missing the complaint is a certification by an attorney that was attached to plaintiff's untimely motion for reconsideration.[5] In the certification, dated May 8, 1985, the attorney represents that he has reviewed Ms. Allen's file and, if the court were to grant the motion and place the case in suspense for at least sixty days, his firm would enter its appearance for plaintiff at that time. The attorney cited trial commitments between May and July as the reason for the firm's inability to enter an appearance as of May 8, 1985.

Nine months have now elapsed since defense counsel entered an appearance. Despite prompt and persistent effort on the part of defense counsel to proceed with discovery and to take the deposition of plaintiff, and despite two express orders of this court, plaintiff has refused and failed to attend the deposition. Illness or physical incapacity of plaintiff's counsel preventing counsel from personally attending such a deposition, where ample opportunity is afforded to obtain other counsel or utilize co-counsel of record, cannot be permitted to thwart discovery. In this regard, I think it not unfair to note that had plaintiff's counsel expended an equal amount of time and effort in preparing the client and attending a conveniently scheduled deposition as the time and effort spent in preparing and filing various pleadings that simply delayed disposition of this case, the deposition would long ago have been completed.[6]

The only effective sanction is dismissal of the action.

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5. Because defendant's third motion for the sanction of dismissal was filed, no formal ruling on the motion to reconsider was entered.

6. For example, the motion to reconsider contained a twenty-two page brief. See also the extensive correspondence of record. Although some of this work may have been performed by an employee of Ms. Thompson, the overall product is the responsibility of counsel.